Filed 6/7/19 P. v. Ketchens CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DENZEL DOMINIQUE KETCHENS et al.,<br><br>Defendants and Appellants. | B282486<br><br>(Los Angeles County Super. Ct. No. YA094354) |

Appeal from a judgment of the Superior Court of Los Angeles County, Alan B. Honeycutt, Judge. Affirmed with directions (Ketchens); affirmed in part and reversed in part with directions (Collins).

Christian Buckley, under appointment by the Court of Appeal, for Defendant and Appellant Denzel Dominique Ketchens.

Patricia Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant Steven Matthew Collins.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants Denzel Dominique Ketchens and Steven Matthew Collins of voluntary manslaughter, a lesser offense of the charged crime of murder (count 1; Pen. Code, § 192, subd. (a)),[1] and assault with a firearm (count 4; § 245, subd. (a)(2)). The jury also convicted Ketchens of carrying an unregistered, loaded handgun (count 3; § 25850, subd. (a)), and convicted Collins of being a felon in possession of a firearm (count 2; § 29800, subd. (a)(1)). The jury found true allegations that Ketchens and Collins, in committing voluntary manslaughter, each personally used a firearm within the meaning of section 12022.5, subdivision (a).

The trial court sentenced Ketchens to 15 years in prison, and sentenced Collins to 16 years 8 months in prison.

We agree with Collins that the evidence is insufficient to support his conviction on count 4 of assault with a firearm and reverse that conviction. We also agree with the defendants and the Attorney General that a recent amendment to section 12022.5 applies retroactively to the defendants and that the trial court should have the opportunity to exercise its discretion under the amendment to strike the firearm enhancements. Because a new sentencing hearing is required, the court may also consider the defendants' arguments regarding the court's restitution orders. We reject the defendants' remaining contentions.

---

[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

## FACTUAL AND PROCEDURAL SUMMARY

### A. *Prosecution Case*

On November 30, 2013, just before 2:00 a.m., Salome Stephenson left a bar in Inglewood and walked to her car parked on Nutwood Street. On the way, she walked passed a group of men and women. One of the women appeared to be upset with one of the men, and two of the men were "checking"–or chastising–a third man.

As Stephenson approached her car's driver side door, she heard gunshots coming from the direction of the group she had just passed. A bullet hit and shattered her car's rear window. The people in the group dispersed and a man wearing a black hoodie ran down Nutwood Street, past Stephenson, and turned right toward Hillcrest Boulevard. The man did not appear to Stephenson to be injured.

About 15 seconds after the man in the hoodie ran past Stephenson, a red truck pulled out of the parking lot where the shots had been fired, then drove down Nutwood Street, past Stephenson, toward Hillcrest Boulevard. It appeared to Stephenson that the occupants of the truck were "looking for someone." As the truck reached Hillcrest Boulevard, Stephenson saw a man lean out of the truck's passenger side window and aim a gun in the direction where the man in the black hoodie had run. Stephenson then heard another round of gunfire, which she believed came from the truck. Stephenson did not see anyone get shot.

A police officer on patrol nearby heard the two sets of gunfire and responded to the scene on Nutwood Street. The officer stopped Stephenson as she began to drive away from the scene. Stephenson described the red truck to an officer and told him where it had gone.

Shortly after the shootings, another police officer spotted a red truck, followed it, then turned on his car's lights and siren to

stop it. Ketchens was driving the truck and Collins, the sole passenger, was in the right front passenger seat. Collins tossed a .40 caliber Glock semiautomatic gun from the truck onto a sidewalk, and Ketchens pulled over.

Police retrieved the gun from the sidewalk and found three expended .40 caliber shell casings in the truck bed. Police also found a .45 caliber semiautomatic firearm under the driver's seat. The gun was not registered to either Ketchens or Collins.

The officers took Ketchens and Collins into custody. Each had gunshot residue on his hands. Forensic tests showed that the casings found in Ketchens's truck bed came from the Glock that Collins had tossed from the truck.

Shortly after the shootings, Kevin Kilgore was found lying unconscious on a sidewalk about four or five blocks from the intersection of Nutwood Street and Hillcrest Boulevard. Kilgore had been shot four times. He was taken by ambulance to a hospital where he died as a result of the bullet wounds. A medical examiner determined that either of two bullets caused "a fatal gunshot wound."

In a parking lot on Nutwood Street, police found 12 spent .40 caliber cartridge casings, which had been fired from the Glock Collins had thrown from the truck. Police also found a .45 caliber handgun in the Nutwood Street parking lot with a magazine containing four live rounds. Kilgore's car was later found with three or four bullet holes in the rear of the car.

Ketchens initially told a police detective that he had been driving his mother's truck and did not know there was a gun in it. He also told the detective he had an alibi. He did not mention that he was involved in the shooting.

Shortly after Ketchens's interview with the detective, Collins told Ketchens, "That was quick thinking on my behalf . . . . They

[didn't] even know about that," and "[p]itch it." Ketchens understood that Collins was referring to how he had thrown the Glock out of the truck. Ketchens told Collins, "They already knew." Collins responded, "They knew? They got it?" Ketchens replied, "Uh-huh." Collins then said, "Uh, fuck."

Collins told a detective that he was the passenger in the red truck, he did not have or see a gun, and he did not throw one out of the truck.

Ketchens subsequently told the detective that when he gave his prior statement he had lied because he was scared. He then said that he had parked his truck in a parking lot and saw a man wearing a hoodie walk up behind the truck and fire about 10 shots from a gun toward the street. Ketchens told the detective that he did not own or have a gun, and no one fired a gun from his truck.

### B. *Ketchens's Defense Case*

Iman Denteh testified that on the night of the shooting, she, Ketchens, Collins, and her cousin decided to go to a bar in Inglewood. Ketchens and Collins went in Ketchens's truck, and Denteh and her cousin followed in Denteh's car. They parked in a lot and Denteh got out of her car. Ketchens and Collins were about 12 feet away from her when a man approached Denteh and asked if he could have her phone number; Denteh told him no. The man grabbed Denteh's hand and she pulled it away. The man punched Denteh in the mouth, and Denteh fell to the ground. The man then stood over Denteh and continued to hit her. Ketchens asked the man, "[W]hy are you hitting a female?" The man shoved Ketchens, and Ketchens hit the man, knocking him out. Denteh and her cousin then left the area.

Ketchens corroborated Denteh's testimony and testified that he was talking with someone in the Nutwood Street parking lot

while Denteh spoke to a man he later learned was Kilgore (the shooting victim). Ketchens saw Denteh fall down and Kilgore standing over her and hitting her. Ketchens asked Kilgore why he hit Denteh, but Kilgore did not respond. Ketchens then "nudged him out [of] the way." Kilgore shoved Ketchens and Ketchens then punched Kilgore in the jaw, knocking him out.

As Ketchens carried Denteh to her car, Kilgore stood up and left the scene with a friend. After Denteh left with her cousin, Ketchens and Collins walked across the street toward a bar. There, friends of Kilgore suggested that Ketchens and Kilgore have a rematch. Ketchens walked back to his truck while Collins stayed there.

While Ketchens waited for Collins to return to the truck, he noticed the Glock handgun on the driver's side floorboard, and believed that Collins had placed it there after they arrived at the parking lot. As Ketchens stood near his truck and checked his phone, a man wearing a hoodie came around a corner, said something to Ketchens, then ran toward Ketchens while pointing a gun at him. Ketchens heard gunshots and believed that the man had fired his gun at him. Ketchens grabbed the Glock from his truck and fired 12 shots at the man. The man ran away, and Ketchens did not know whether he had hit him.

Collins had been walking from across the street to Ketchens's truck when the gunfire began. The two got into the truck, and Collins said, "[S]omeone just tried to kill us." As Ketchens drove down Nutwood Street, Collins, who thought he had been shot, looked for a wound on his body. After Ketchens turned right onto Hillcrest Boulevard, Collins thought he saw the person with the gun get into a car in front of them. Ketchens later identified the car as Kilgore's. Collins grabbed the Glock, which Ketchens had placed near the truck's center console, and shot at the car.

A DNA expert testified that he analyzed the DNA from the unexpended rounds and grip of the gun left in the Nutwood Street parking lot. The expert concluded that neither Ketchens's nor Collins's DNA was found on the rounds and grip, and he could not exclude the possibility that Kilgore's DNA was on the unexpended rounds and grip. Ketchens also introduced an expert who testified about the effect of stress and trauma of an incident on witness recollection of the incident and an expert who testified that the firing of 12 rounds was not an unreasonable response to a belief in the need to defend oneself against a shooter.

Collins did not present any evidence in his defense.

## DISCUSSION

### I. Failure to Instruct on Juror Unanimity

Ketchens and Collins contend that the court prejudicially erred by failing to instruct the jury regarding the requirement of juror unanimity as to a specific crime. Because we conclude that any error was harmless, we reject this argument.

The California "Constitution requires that each individual juror be convinced, beyond a reasonable doubt, that the defendant committed the *specific* offense he is charged with. [Citation.] Therefore, when the evidence suggests more than one discrete crime, either (1) the prosecution must elect among the crimes or (2) the trial court must instruct the jury that it must unanimously agree that the defendant committed the same criminal act. [Citations.] The unanimity instruction must be given sua sponte, even in the absence of a defense request to give the instruction." (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 569 (*Hernandez*).)

Ketchens argues that the evidence suggests at least two possible scenarios for Kilgore's homicide: (1) Ketchens shot Kilgore in the Nutwood Street parking lot, and although Kilgore was able

to run from the scene, at least one shot ultimately proved to be fatal; and (2) Ketchens aided and abetted Collins's act of firing at least one fatal shot from Ketchens's truck after they had turned onto Hillcrest Boulevard. Some jurors, Ketchens asserts, might have believed he was guilty as the shooter under the first scenario, but not as an aider and abettor under the second; other jurors might have rejected the possibility that he fired a fatal shot, but that Ketchens was guilty because he aided and abetted Collins's shootings.

Collins makes a similar argument: Some jurors may have found him guilty solely because he fired at Kilgore from the truck, while others may have believed that Ketchens fired the only fatal shots and that Collins was guilty solely as Ketchens's aider and abettor.

The unusual facts of this case present a difficult question of whether the trial court should have given a unanimity instruction. We need not determine whether a unanimity instruction was required because, even if it was, the court's failure to give that instruction was harmless.

There is a split among the Courts of Appeal as to whether the harmless error standard applicable to federal constitutional errors (*Chapman v. California* (1967) 386 U.S. 18 (*Chapman*)) or our standard for state law error (*People v. Watson* (1956) 46 Cal.2d 818 (*Watson*)) governs the erroneous failure to give a unanimity instruction. (See *Hernandez*, *supra*, 217 Cal.App.4th at p. 576; *Wolfe*, *supra*, 114 Cal.App.4th at pp. 185–186.) Under either standard, however, given the jury's verdict and the undisputed facts, defendants have not demonstrated prejudicial error. Although defendants correctly observe that only two of the four shots were fatal, neither defendant has demonstrated that the record coupled with the jury's verdicts and findings

support a viable circumstance in which each defendant did not either shoot or aid and abet in one of the fatal shots.

The jury's guilty verdict for voluntary manslaughter conclusively shows that it rejected Ketchens's position that he acted in self-defense. The jury's findings that both defendants personally used a firearm in committing voluntary manslaughter coupled with the undisputed evidence that: (1) there were no other shooters during the incident, (2) Collins's gun was the source of the fatal bullets and Collins demonstrated his intent to kill Kilgore when he joined Ketchens after Ketchens used Collins's gun in the parking lot, and (3) Collins shot at Kilgore from Ketchens's vehicle reflect the absence of prejudicial error beyond a reasonable doubt.

## II. Confrontation Clause

Defendants contend that their rights under the Sixth Amendment's confrontation clause were violated when the court allowed Stephenson to testify while wearing a head scarf covering part of her face. The argument raises a mixed question of fact and law. (See *People v. Arredondo* (2017) 13 Cal.App.5th 950, 968 (*Arredondo*), review granted on confrontation clause issue Nov. 15, 2017, S244166.)[2] We defer to the trial court's factual findings, independently determine the applicable law, and apply the law to the facts de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894; *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 964.)

---

[2] The California Supreme Court granted review in *Arredondo* to consider whether a defendant's right of confrontation was violated when he was unable to see witnesses as they testified because the trial court allowed a computer monitor on the witness stand to be raised by several inches to allow the witnesses to testify without seeing the defendant. (*Arredondo*, *supra*, 13 Cal.App.5th 950.)

### A. *Additional Facts*

When Stephenson appeared in court to testify during trial, she wore a garment the court described as a white "scarf that cover[ed] her entire face"; her right eye was "visible slightly, a portion of her nose, and a little bit of her left eye; otherwise, her head and face [were] fully covered."

Ketchens's counsel objected to Stephenson's wearing of the scarf[3] while testifying because "we cannot see her face" and are not "able to see her facial expressions." The court informed counsel that it would ask Stephenson if she is wearing the scarf for religious reasons, and if so, the court would not ask her to remove it.

Outside the presence of the jury, the court asked Stephenson why she was wearing "a head garment." Stephenson responded, "I'm Muslim." The court then inquired, "Is that part of the Muslim faith that requires you to have the head scarf in the manner that you have [it]?" Stephenson answered, "Yes."

The court then allowed the prosecutor to begin his direct examination of Stephenson without instructing Stephenson to remove her scarf. After approximately 10 minutes of questioning, the court recessed for the day and informed counsel that it would "take up the issue of the witness and the head scarf" the next morning.

The next day, the court described Stephenson's head scarf more fully as follows: "It covers her face and head with the exception of her [face] from her hairline down to her right cheek. Her right eye is visible and her side of her nose is visible at times. It otherwise covers her lower jaw area on the right side, her mouth,

---

[3] We use the word "scarf" because it is the word used by the trial court and counsel in this case. We mean no disrespect by doing so.

and it covers almost the entire left side of her face. It's tight against her face. You can see clearly the outline of her face when she talks, her lips. She is speaking clearly under questioning by counsel. Her body language is apparent to the jurors. I'll describe her dress as no different as if a male had a full face beard with the exception that you would not be able to see her left eye and her nose in the manner in which she currently appears."

The court stated that it had considered the authorities that counsel had submitted on the confrontation clause question, then informed counsel of its tentative ruling to allow Stephenson to testify while wearing the head scarf. The court explained: "The court finds that on balance, recognizing the important interests in this case as discussed is the religious protection and freedom of the witness in this case. I have no reason to inquire further or allow further inquiry when she states that her appearance in court today is because of a religious reason. It's not for this court to question as to whether her interest is genuine or not. I accept her representations that she is wearing the head scarf for religious purposes in court. . . . I recognize that there is an intrusion with the right to confrontation. The jurors, counsel can[]not see the entirety of the witness's face in the manner in which I've described. However, the intrusion and interference with the right to confrontation is a minimal intrusion. The jurors are quite clearly able to hear her voice, see her facial expressions even through the head scarf . . . . [T]he head scarf that was worn yesterday was tightly worn against the face where you could see the outline of her lips when her mouth was opening, the expression of her face to some extent. Her body language is clear and apparent to the jurors. And while I recognize that there's probably two-thirds of her face that's not visible, I do find that on balance, the interest of the religious freedom and rights of the . . . witness in this case

as compared to the rights of confrontation as to both defendants are minimally diminished by the appearance of the witness in court today."

Ketchens's counsel renewed her objection and asked the court to "inquire further with respect to [Stephenson's] religion or why and how she has to wear it." Counsel added that she believed that Stephenson was wearing the head scarf not for religious reasons but because she was fearful, and noted that Stephenson did not wear a head scarf when she testified at the preliminary hearing or at the time of the crime.

In response to Collins's counsel's argument that requiring Stephenson to remove the scarf would constitute only a "minor infringement" on her "First Amendment religious rights," the court stated: "I don't know if it's a minor intrusion or not. I confess that I'm ignorant of the teachings and requirements of the Muslim faith," and "what appears to be a simple act of moving the veil to one side may be [an act of] great significance to a person of the Muslim faith."

Defense counsel responded by arguing that the court's ignorance on the issue supported the request for questioning Stephenson further. In addition to asking the court to conduct some "relatively minor probing" regarding Stephenson's religious beliefs, counsel pointed out that the court had not asked Stephenson if she could remove the scarf, "or at least pull it back so that we can see her face," while testifying without violating her religious beliefs.

The court and Stephenson then engaged in the following colloquy outside the presence of the jury:

"The court: Ms. Stephenson, yesterday we had a brief conversation in regards to your head dress and head scarf. Today you have both eyes exposed. Your nose is not exposed. The manner

in which you're wearing your head scarf, are you able to move and expose any more of your face?

"[Stephenson]: If you need to see my nose, that's fine.

"The court: And is there any religious reason as to why you can't expose the remainder of your face?

"[Stephenson]: It's to protect my beauty.

"The court: Okay. So the witness has pulled down the head scarf. Her nose is exposed, both eyes are exposed." The court added that, with "the benefit of watching her testimony for about [10] minutes yesterday," it believed that the manner in which Stephenson wore the scarf caused "a minimal negligible intrusion upon the Sixth Amendment right to confrontation." The court then adopted its tentative ruling and the prosecutor resumed his examination of Stephenson. During the ensuing colloquy, Stephenson reiterated each of the substantive points she testified to the day before.

### B. *Analysis*

The Sixth Amendment provides the accused in a criminal prosecution with "the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.)[4] This right, made applicable to the states via the Fourteenth Amendment (*Pointer v. Texas* (1965) 380 U.S. 400, 403; *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145,

---

[4] California provides for the right of confrontation in its constitution and by statute. (See Cal. Const., art. I, § 15 ["defendant in a criminal cause has the right . . . to be confronted with the witnesses against the defendant"]; Pen. Code, § 686 ["In a criminal action the defendant is entitled . . . to be confronted with the witnesses against him."].) Defendants do not rely on these provisions, and therefore, we do not address them.

1154), " 'provides two types of protections for a criminal defendant: [T]he right physically to face those who testify against him [or her], and the right to conduct cross-examination.' " (*Coy v. Iowa* (1988) 487 U.S. 1012, 1017 (*Coy*); accord, *U.S. v. Carter* (9th Cir. 2018) 907 F.3d 1199, 1204 (*Carter*).)

The right to a face-to-face meeting between accused and accuser follows from the confrontation clause's "primary object": "to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Mattox v. United States* (1895) 156 U.S. 237, 242–243 (*Mattox*), italics omitted; accord, *Maryland v. Craig* (1990) 497 U.S. 836, 845 (*Craig*); *California v. Green* (1970) 399 U.S. 149, 157–158.)

As this statement indicates, the face-to-face encounter implicit in the confrontation clause is not only between accuser and accused, but between accuser and jury. That encounter enables the jurors " 'to obtain the elusive and incommunicable evidence of a witness'[s] deportment while testifying' " (*Kentucky v. Stincer* (1987) 482 U.S. 730, 737, fn. 8 (*Kentucky*)); an ability, our Supreme Court has explained, that is "as important a component of the right of confrontation as the defendant's opportunity to cross-examine the adverse witness." (*People v. Arreola* (1994) 7 Cal.4th 1144, 1155.)

The ability of the defendant and counsel to observe the witness's demeanor may also be critical for cross-examination. (See *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1358

[" 'observation of a witness on direct [examination] is important to the planning and execution of effective cross-examination' "]; *Arredondo*, *supra*, 13 Cal.App.5th at p. 995 (dis. opn. of Slough, J.) ["an accused must be able to observe the witness against him and assist his counsel in exploring the veracity and credibility of his accuser"].) During cross-examination, counsel may, for example, notice that the witness appears comfortable or uncomfortable, hesitant or confident, indifferent or nervous; and such observations may "guide counsel in prodding, cajoling, and prying information from the witness to the benefit of the accused." (Houchin, *Confronting the Shadow: Is Forcing a Muslim Witness to Unveil in a Criminal Trial a Constitutional Right, or an Unreasonable Intrusion?* (2009) 36 Pepperdine L.Rev. 823, 861 (Houchin).)

Apart from the opportunity for jurors, defendants, and counsel to evaluate the witness's demeanor, face-to-face confrontation also "enhances the accuracy of fact[]finding" because of its effect upon the witness. (*Craig*, *supra*, 497 U.S. at p. 846.) "It is always more difficult," the high court has explained, "to tell a lie about a person 'to his face' than 'behind his back.' " (*Coy*, *supra*, 487 U.S. at p. 1019.)

Lastly, the requirement that prosecution witnesses testify face-to-face serves a "symbolic purpose." (*Craig*, *supra*, 497 U.S. at p. 847.) There is, the high court has explained, "something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' " (*Coy*, *supra*, 487 U.S. at p. 1017.) These "human feelings of what is necessary for fairness" not only explains why the phrase, " 'Look me in the eye and say that' " "has persisted," but also why "the right of confrontation 'contributes to the establishment of a system of criminal justice in which the

perception as well as the reality of fairness prevails.' " (*Id.* at pp. 1018-1019.)

The right to a face-to-face confrontation is not satisfied by the mere physical presence of the witness in the courtroom. In *Coy*, *supra*, 487 U.S. 1012, for example, although the testifying witness and defendant were both present in the courtroom, the placement of a screen between the two constituted an "obvious" violation of the "right to a face-to-face encounter." (*Id.* at p. 1029.) And in *Herbert v. Superior Court* (1981) 117 Cal.App.3d 661, the defendant's confrontation right was denied because the court placed the defendant and his accuser in positions within the courtroom where the defendant could hear, but not see, the witness. (*Id.* at p. 671; see also *People v. Murphy* (2003) 107 Cal.App.4th 1150, 1157–1158 [placement of one-way glass that prevented witness from seeing defendant violated confrontation clause].)

Similarly, the defendant is deprived of a face-to-face encounter with a witness who testifies in court wearing a ski mask (*People v. Sammons* (1991) 191 Mich.App. 351 [478 N.W.2d 901] (*Sammons*)) or a disguise that conceals "almost all of [the witness's] face from view" (*Romero v. State* (Tex.Crim.App. 2005) 173 S.W.3d 502, 503 (*Romero*)). Allowing the witness to use such a disguise would effectively "remove the 'face' from 'face-to-face confrontation.' " (*Id.* at p. 506; see also *U.S. v. Alimehmeti* (S.D.N.Y. 2018) 284 F.Supp.3d 477, 489 [court rejected undercover officer's use of disguise, "such as using a niqab" while testifying because it would compromise the jury's ability to evaluate the credibility of the officer].)

Covering part of a witness's face, however, does not necessarily implicate the confrontation clause. In *U.S. v. de Jesus-Casteneda* (9th Cir. 2013) 705 F.3d 1117 (*de Jesus-Casteneda*), the government requested that a confidential informant

be permitted to wear a wig, sunglasses, and mustache "to 'help disguise some of his features.' " (*Id.* at p. 1119.) After the defense objected, the witness was " 'permitted to testify while wearing a fake mustache and wig but no sunglasses; his eyes remained visible.' " (*Ibid.*) The trial court found that "the disguise was a 'very small impingement . . . on the ability of the [jury] to judge [the informant's] credibility.' " (*Ibid.*) The Ninth Circuit affirmed, holding that "the disguise in the form of a wig and mustache did not violate the [c]onfrontation [c]lause." (*Id.* at p. 1121.)[5]

Here, the Attorney General argues that Stephenson's wearing of her scarf did not deprive defendants of their confrontation rights because it "amounted to a minimal impairment of [defendants'] face-to-face confrontation rights." As we explain below, we agree with the Attorney General as to Stephenson's second day of testimony, and we need not decide whether defendants' confrontation rights were violated during the first day of Stephenson's testimony because any error that occurred was harmless beyond a reasonable doubt.

Prior to Stephenson's second day of testimony, the court described Stephenson's scarf as being white and "tight against her face," which allowed the jurors, defendants, and counsel to

---

[5] In addition to *de Jesus-Castaneda*, the Attorney General relies on *Morales v. Artuz* (2d Cir. 2002) 281 F.3d 55 (*Morales*). In that case, a New York state court allowed, over the defendant's objections, a witness to testify while wearing "dark" sunglasses. (*Id.* at p. 57.) On habeas review, the Second Circuit Court of Appeals rejected the defendant's confrontation clause challenge, explaining that the "obscured view of the witness's eyes . . . resulted in only a minimal impairment of the jurors' opportunity to assess [the witness's] credibility." (*Id.* at pp. 60-61.) We do not necessarily agree with the *Morales* court's conclusion.

"see clearly the outline of her face [and her lips] when she talks," and to "see her facial expressions even through the head scarf." The scarf thus appears to have been somewhat transparent. The jurors were also "quite clearly able to hear her voice," the court stated, and her "body language [was] apparent to the jurors." The court compared her scarf covering to a "full face beard" on a man's face, "with the exception that you would not be able to see her left eye and her nose." After discussion among the court, counsel, and Stephenson, Stephenson ultimately pulled down her scarf so that both eyes and her nose were exposed, thereby rendering the coverage no greater than that of a man's full beard.

In light of the facts that Stephenson ultimately revealed her eyes and nose and that the scarf did not prevent others from seeing her lips and facial expressions through the scarf, it appears that the scarf did not prevent the trial participants from evaluating " 'the elusive and incommunicable evidence of a witness'[s] deportment while testifying' " (*Kentucky*, *supra*, 482 U.S. at p. 737, fn. 8), or from noticing whether the witness appears comfortable or uncomfortable, hesitant or confident, indifferent or nervous (Houchin, *supra*, 36 Pepperdine L.Rev. at p. 861). The same ability to discern Stephenson's facial expressions mitigates the concern that Stephenson would be more likely to "to tell a lie" about the defendants from behind a concealing mask (*Coy*, *supra*, 487 U.S. at p. 1019) or weaken the "symbolic purpose" of the confrontation clause (*Craig*, *supra*, 497 U.S. at p. 847). Because the purposes and salutary benefits of the face-to-face confrontation right were not meaningfully impaired by the nature of Stephenson's scarf and the way she wore it on the second day of her testimony, we conclude that the defendants' right to face-to-face confrontation was thereby not infringed.

The manner in which Stephenson wore her scarf on the first day of her testimony presents a more difficult issue. Her scarf, the court explained, "cover[ed] her entire face," but for her right eye, which was "visible slightly, a portion of her nose, and a little bit of her left eye." Because Stephenson's scarf covered substantially more of her face on the first day of her testimony, the greater coverage arguably crossed the constitutional line that exists somewhere between the ski mask worn in *Sammons*, *supra*, 478 N.W.2d 901 and the disguise in *Romero*, *supra*, 173 S.W.3d 502, on one side, and the less concealing wig and fake mustache in *de Jesus-Castaneda*, *supra*, 705 F.3d 1117. We need not, however, decide whether the scarf triggered the defendants' confrontation clause rights, because even if it did, any error was harmless.

A violation of the confrontation clause does not require reversal if we conclude that the error was harmless beyond a reasonable doubt. (*Coy*, *supra*, 487 U.S. at p. 1021; *Chapman*, *supra*, 386 U.S. at p. 24; *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1225.) In making this determination, we cannot consider whether Stephenson's testimony would have been different if she had removed her scarf or whether the jury's assessment of her testimony might have been altered; "such an inquiry would obviously involve pure speculation." (*Coy*, *supra*, 487 U.S. at pp. 1021-1022.) The harmless error question must "be determined on the basis of the remaining evidence." (*Id.* at p. 1022; accord, *Carter*, *supra*, 970 F.3d at p. 1210; *People v. Adams* (1993) 19 Cal.App.4th 412, 427.) In this case, the "remaining evidence" includes Stephenson's own testimony given on the second day of her testimony.

Stephenson's testimony on the first day takes up nine pages of the reporter's transcript, and according to the court, lasted only

10 minutes. She was not cross-examined and she was shown no exhibits. The second day, after Stephenson revealed enough of her face to avoid a violation of defendants' confrontation rights, Stephenson's testimony, including cross-examination, filled the morning session of the trial and most of the afternoon session, encompassing 112 pages of the reporter's transcript. Two exhibits—a map of the crime scene area and a video recording of the events on Nutwood Street—were shown to and elaborated upon by Stephenson. Significantly, there are no material facts that Stephenson testified to on her first day of testimony that she did not repeat on her second day. Indeed, the second day began with the prosecutor and Stephenson effectively reviewing and reproducing Stephenson's testimony from the day before. Under these circumstances, and based on our review of the entirety of Stephenson's testimony, we are convinced beyond a reasonable doubt that, if Stephenson's brief testimony on her first day of testifying violated defendants' confrontation rights, the error was harmless.[6]

---

[6] The Supreme Court has explained that the face-to-face confrontation right is not absolute and "must occasionally give way to considerations of public policy and the necessities of the case." (*Mattox, supra,* 156 U.S. at p. 243; see also *Coy*, *supra*, 487 U.S. at p. 1021 [exceptions may be "necessary to further an important public policy"].) This exception applies when the deprivation of the face-to-face encounter is "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." (*Craig*, *supra*, 497 U.S. at p. 850; accord, *Arredondo*, *supra*, 13 Cal.App.5th at p. 963; *Carter*, *supra*, 907 F.3d at p. 1208.) Reliability is evaluated by considering the "combined effect of [four] elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." (*Craig*, *supra*, 497 U.S. at p. 846.) The Attorney General contends

## III. Failure to Give CALCRIM No. 3575

Four days after the jury began deliberations, one juror was replaced with an alternate. The court instructed the reconstituted jury as follows: "Now that we are substituting in another juror, your deliberations have to start from the beginning. So we're now substituting in a new juror. You have to begin jury deliberations again with our juror who has joined us as juror number 6."

At the request of the jury, counsel reargued the case and the court further instructed the jury: "Since we have been joined by juror number 6 . . . , you'll have to begin your deliberations anew."

On appeal, defendants contend that the court erred by failing to give CALCRIM No. 3575, which instructs the jurors to "set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place." (CALCRIM No. 3575.)[7]

---

that this exception applies here because allowing Stephenson to wear her scarf was necessary to further the important public policy of respecting and accommodating witnesses' religious beliefs. Because we resolve the issues in this case on other grounds, we do not reach this issue.

[7] The complete instruction under CALCRIM No. 3575 is: "One of your fellow jurors has been excused and an alternate juror has been selected to join the jury. [¶] Do not consider this substitution for any purpose. [¶] The alternate juror must participate fully in the deliberations that lead to any verdict. The People and the defendant[s] have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard

The instruction, which must be given sua sponte, is based upon the holding of *People v. Collins* (1976) 17 Cal.3d 687 (*Collins*), that when a juror substitution is made, "the court [must] instruct the jury to set aside and disregard all past deliberations and begin deliberating anew. The jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had." (*Id.* at p. 694.) Any error in failing to give the required instruction is subject to the state law harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Renteria* (2001) 93 Cal.App.4th 552, 559.)

Defendants contend that the court's instruction in this case failed to communicate the substance of CALCRIM No. 3575 or satisfy the requirements under *Collins* because it neglected to instruct the jury to set aside and disregard all past deliberations. The Attorney General disagrees and asserts that any error was harmless.

Both sides rely on *People v. Odle* (1988) 45 Cal.3d 386 (*Odle*). In that case, the trial court instructed the jury as follows: " 'The court is compelled under the law to admonish you that you are to start your deliberations from scratch because, obviously, . . . [the alternate] has not had the benefit of whatever

---

the earlier deliberations and decide this case as if those earlier deliberations had not taken place. [¶] Now, please return to the jury room and start your deliberations from the beginning."

discussions you have had so far . . . . Start your discussions from scratch so that [the alternate] has full benefit of everything that has gone on between the jury up to the present time.' " (*Id.* at p. 405.) The Supreme Court stated that the first part of this instruction—directing the jurors " 'to start [their] deliberations from scratch' "—"implied the jury should disregard previous deliberations." (*Ibid.*) If the trial court had stopped there, it appears that the instruction would have been satisfactory.

The next part of the instruction, however, in which the jury was further instructed to " 'start your discussions from scratch so that [the alternate] has full benefit of everything that has gone on . . . up to the present time,' " was erroneous because it "implied that the jury should not disregard previous deliberations, but instead, start again in order to bring the new juror 'up to speed' on what matters have already been discussed and possibly decided." (*Odle*, *supra*, 45 Cal.3d at p. 405.)

Here, the trial court's instruction that the jurors "deliberations have to start from the beginning" is analogous to the acceptable part of the instruction in *Odle* that the discussions must "start from scratch." (*Odle*, *supra*, 45 Cal.3d at p. 405.) As in *Odle*, the trial court's statement implied that the jury should disregard previous deliberations. The trial court did not make the mistake the *Odle* trial court made of making further statements that implied that the jurors merely needed to bring the new juror "up to speed" on what had been discussed or decided. We conclude, therefore, that the trial court did not err in giving the instruction.

## IV. Sufficiency of Evidence to Support Conviction of Assault with a Firearm

Defendants contend that the evidence is insufficient to support the convictions for assault with a firearm under section 245, subdivision (a)(2). This count is based upon the gunshot that shattered the window of Stephenson's car as she stood next to it.

In evaluating a challenge to a conviction based on the insufficiency of the evidence, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We presume in "support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*Ibid.*)

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) A defendant may be "guilty of assault if he intends to commit an act 'which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences.' " (*People v. Williams* (2001) 26 Cal.4th 779, 787.) The crime "does not require a specific intent to injure the victim." (*Id.* at p. 788.) Indeed, one who intends to assault one person may be guilty of "assaulting others who are 'reasonably foreseeable.' " (*People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1353 (*Trujillo*); accord, *People v. Tran* (1996) 47 Cal.App.4th 253, 262 ["an intent to do an act which will injure any reasonably foreseeable person is a sufficient intent for an assault charge"].) Thus, in *People v. Riva* (2003) 112 Cal.App.4th 981, the defendant who fired shots

from one car at the occupants of another car was guilty of assault against the pedestrian he did not intend to hit. (*Id.* at p. 998.)

Here, Ketchens testified that he fired 12 shots at a man in a parking lot located a short distance from Stephenson's car parked on the street. Ketchens's testimony, together with Stephenson's testimony regarding the first set of gunshots and the shattering of her window, is sufficient to support an inference that Ketchens fired the bullet that shattered the window. The jury could further reasonably infer that Stephenson, who was standing next to her car at the time, was a reasonably foreseeable victim of Ketchens's gunfire. (See *Trujillo*, *supra*, 181 Cal.App.4th at p. 1355 ["Because the gravamen of assault is the *likelihood* that the defendant's action will result in a violent injury to another [citation], it follows that a victim of assault is one for whom such an injury was likely."].)

The same inferences and conclusion cannot be made as to Collins. There is evidence that all the bullets shot during the incident were fired from one gun: the Glock that Ketchens used to fire the first round of shots and Collins later used to fire at a car on Hillcrest Boulevard. There is no evidence that Collins fired any of the shots that could have hit Stephenson's car window. Nor is there substantial evidence that at the time Ketchens fired his gun in the parking lot that Collins was aiding and abetting his criminal conduct. According to Ketchens, Collins was surprised by the gunfire and did not participate in, or aid and abet, any shooting until after Stephenson's window had been shot and Ketchens and Collins were driving from Nutwood Street onto Hillcrest Boulevard. There is, therefore, insufficient evidence to support Collins's conviction of assault with a firearm against Stephenson.

## V. Retroactivity of Amendment to Section 12022.5

Each defendant's sentence includes four years for the firearm enhancement under section 12022.5, subdivision (a). At the time of sentencing, the trial court had no authority to strike firearm enhancements. (Former § 12022.5, subd. (c).) Thereafter, the Legislature amended section 12022.5, subdivision (c), to provide that the "court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.5, subd. (c).) As the Attorney General concedes, the defendant's judgment of conviction was not yet final when the amendment took effect, and the defendants are entitled to the benefit of the change. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; *People v. Francis* (1969) 71 Cal.2d 66, 75–76; *People v. Vela* (2018) 21 Cal.App.5th 1099, 1114.) After remand, the court shall determine whether to strike any enhancement pursuant to its discretionary authority under section 12022.5, subdivision (c).

## VI. Restitution

At their sentencing hearings, each defendant was ordered to pay $1,326.50 in victim restitution. On appeal, defendants contend that the orders require clarification because they are unclear as to whether each defendant must pay the stated amount, or whether the stated amount is a single joint and several obligation. (See *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535 [court has authority to order restitution be paid by multiple defendants jointly and severally].)

The Attorney General contends that the argument is forfeited by the defendants' failures to object to the orders, and in any event,

clarification is unnecessary because section 1202.4, subdivision (j) provides that restitution collected from one source shall be credited to any judgment against a defendant for the same loss.

Ketchens argues that because the court will hold a hearing to consider whether to exercise its discretion under section 12022.5, subdivision (c), "there is no harm in indicating that [the restitution] issue should also be resolved at that hearing." Collins agrees with Ketchens, and adds that defendants merely seek clarification of the restitution order and determining that now will conserve judicial resources.

The Attorney General is correct that the failure to object to the restitution order forfeits the issue on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Smith* (2001) 24 Cal.4th 849, 852.) The defendants' positions, however, are also valid: Because the trial court will be holding a further hearing to resentence Collins after our reversal of the conviction on count 4 and to consider whether to exercise its discretion under section 12022.5, subdivision (c), the trial court may, in the interest of judicial economy, also consider the parties' arguments concerning clarification of the restitution orders.

## DISPOSITION

The conviction against Collins on count 4 for assault with a firearm is reversed based on the insufficiency of the evidence. The convictions of Ketchens and Collins are otherwise affirmed. The court shall hold a new sentencing hearing to address the reversal of Collins's conviction on count 4 and to have the opportunity to exercise its discretion under section 12022.5, subdivision (c). The court may also consider defendants' arguments concerning clarification of the restitution orders.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

JOHNSON, J.

BENDIX, J.